No. 1075

IN THE

Supreme Court of the United States

October Term, 1959

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Peyton E. Van K[illegible]
Peyton H. H. Peyton
William E. H[illegible]
[illegible]

Weaver & Van K[illegible]
Suite 705
1701 K Street, N. W.
Washington 6, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

VULCANIZED RUBBER & PLASTICS COMPANY, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Vulcanized Rubber & Plastics Company, a corporation, respectfully prays that a *writ of certiorari* issue to review the final judgment of the United States Court of Appeals for the Third Circuit[1] entered in the above-entitled case on March 8, 1961, affirming a judgment entered on May 9, 1960 by the United States District Court for the Eastern District of Pennsylvania.[2]

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[1] Hereinafter referred to as the "Court of Appeals below."

[2] The certified copy of the record in the Court of Appeals below, which has been filed with the Clerk of this Court, is hereinafter referred to as "R.—, p.—."

OPINION BELOW

The opinion of the Court of Appeals below, *United States of America* v. *Vulcanized Rubber & Plastics Co.*, 288 F. 2d 257 (3 Cir. 1961), is printed in the Appendix to this Petition[3] (App., pp. 1a-10a).

JURISDICTION

The judgment of the Court of Appeals below was entered on March 8, 1961 (App., p. 11a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), 62 Stat. 928.

QUESTIONS PRESENTED

1. Whether the United States, after a final ruling by the United States Court of Appeals for the District of Columbia Circuit

> that a cease and desist order of the Federal Trade Commission prohibiting Petitioner from designating combs manufactured by it as "rubber" or "hard rubber" does *not* "as written" prohibit Petitioner from designating such combs as "rubber-resin,"

may circumvent such ruling by the recovery of civil penalties from Petitioner in the Court of Appeals below on the ground

> that Petitioner's designation of its combs as "rubber-resin" is in violation of the *same* cease and desist order found by the United States Court of Appeals for the District of Columbia Circuit *not* by its terms to prohibit Petitioner's designation of its combs as "rubber-resin."

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[3] Hereinafter referred to as "App., p. —."

2. Whether the United States may recover civil penalties from Petitioner for the designation of combs manufactured by it as "rubber-resin" (a) without the issuance of a complaint charging that such designation is an unfair method of competition or unfair or deceptive act or practice in commerce, (b) without affording Petitioner an opportunity for a hearing on such complaint and (c) without the issuance of a cease and desist order prohibiting the use of such designation, all as required by Section 5(b) of the Federal Trade Commission Act, and (d) without affording Petitioner an opportunity for direct appeal from such order to an appropriate United States Court of Appeals as required by Section 5(c) of said Act.

STATUTE INVOLVED

The pertinent provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44 *et seq.* are printed in the Appendix to this Petition (App., pp. 14a-17a).

STATEMENT OF THE CASE

This Petition for a *writ of certiorari* involves a penalty suit under Section 5(l) of the Federal Trade Commission Act for alleged violation by Petitioner of a final cease and desist order issued by the Federal Trade Commission[1] under Section 5(b) of the Act.

Petitioner, whose offices are in Morrisville, Bucks County, Pennsylvania has for many years engaged in the manufacture, sale and distribution of combs in the national market. Until 1950, Petitioner made combs designated by it as "rubber" and "hard rubber" by the sulphur vulcanization method (R., Appellant's App., p. 49a). Under this method, rubber and sulphur are vulcanized under heat, resulting in a distinct and definite product known in the industry as "hard rubber" (R., Appellant's App., p. 16a).

[1] Hereinafter also referred to as the "Commission."

Late in 1950, Petitioner commenced to manufacture its combs from a patented compound containing 13% rubber and 85% resin.[3] This compound is manufactured by the United States Rubber Company under patents owned by it, and is sold to manufacturers under its trademarks, including "Kralastic" and "Royalite" (R., Appellant's App., p. 22a). This rubber-resin compound is more expensive than the rubber and sulphur used in the sulphur vulcanization method. Its advantage arises from its adaptability to the "injection molding" process (R., Appellant's App., p. 50a).

After adoption of the new method for the manufacture of combs, Petitioner continued to label its combs "rubber" and "hard rubber." The Federal Trade Commission issued a complaint under Section 5(b) of the Federal Trade Commission Act charging that Petitioner's designation of its combs as "rubber" and "hard rubber" constituted unfair methods of competition and unfair and deceptive acts and practices under the Act because its combs thus designated were not made by the sulphur vulcanization method which was previously utilized by Petitioner. After a hearing at which more than 3700 pages of testimony and approximately 200 exhibits were adduced, the Commission found that the term "rubber" and the term "hard rubber," as applied to combs, are words of art describing *only* combs made by the sulphur vulcanization method (R., Appellant's App., pp. 49a-56a); (App., p. 2a).

The sole issue raised by the Commission's complaint against Petitioner was whether Petitioner's combs made of a rubber-resin compound were entitled to be designated as "rubber" or "hard rubber" equally with combs made of the combination of sulphur and rubber by the process of

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[3] "This material is composed of approximately 13% nitrile rubber, 85% of hardening resin and small percentages of stabilizer and color" (Opinion of the Commission; R., Appellant's App., p. 49a).

vulcanization. No other term, designation or label of combs manufactured by Petitioner was before the Commission, and its decision was simply that the terms "rubber" and "hard rubber," when employed to designate combs, had acquired the unique meaning of combs manufactured by the sulphur vulcanization method.

The possible designation by Petitioner of its combs as "rubber-resin" never arose throughout the lengthy Commission hearing, since the hearing was directed exclusively to the determination of what was understood in the industry and by the consuming public as "rubber" and "hard rubber" when these designations are applied to combs. There is not now and there never was any dispute before the Commission during the hearing that the technical description of the compound of which Petitioner's combs are made is *rubber-resin*.[6]

The Commission issued a cease and desist order, following its findings concerning the designation of Petitioner's combs as "rubber" and "hard rubber," directing Petitioner to cease and desist from representing its combs as "rubber" or "hard rubber" unless such combs are in fact made of vulcanized hard rubber (R., Appellant's App., pp. 56a-57a). Petitioner filed a petition for review of the

[6] This was established by seven documentary exhibits referred to by the Hearing Examiner. Thus the Hearing Examiner states: "In Commission's Exhibit 68, the various types of Kralastic manufactured by Naugatuck Chemical [a division of U. S. Rubber Company] are referred to as '*rubber-resin* blends for molding and extrusion.' The same is true in Commission's Exhibit 69, another advertisement of the manufacturer." (Emphasis supplied) (R., Appellant's App., p. 21a). "In the numerous so-called Daly patents (Commission's Exhibits 21, 22, and 23, and Respondent's Exhibits 128 and 129), under which Kralastic D is manufactured by United States Rubber, the assignee of such patents, there is no claim that these patents will produce a hard rubber product but rather that they will produce a hard, tough, thermoplastic, homogeneous mixture of rubber and resin, a *rubber-resin* compound." (Emphasis supplied) (R., Appellants App., p. 47a).

Commission's order in the United States Court of Appeals for the District of Columbia Circuit. While the petition for review was pending, Petitioner submitted a compliance report, as required by Commission rules, advising the Commission of its intention to abandon the designation of its combs as "rubber" and "hard rubber" and to commence designating such combs as "rubber-resin." On November 1, 1957, the Commission advised Petitioner that it did not consider the designation of its combs as "rubber-resin" as satisfactory compliance with its order (R., Appellant's App., p. 62a).

Petitioner, faced with this subsequent interpretation by the Commission of its order, amended its pending petition for review in the United States Court of Appeals for the District of Columbia Circuit and informed that Court of the Commission's interpretation of its order. Petitioner took the position in that Court that the Commission's subsequent interpretation of its order exceeded the scope of the complaint, the evidence and the findings upon which the order was based, as well as of the order itself. Thereafter, in the proceeding before the United States Court of Appeals for the District of Columbia Circuit, Petitioner did not challenge the Commission's order as written, but contended that the Commission's subsequent interpretation of its order exceeded the terms and bounds of the order.

The United States Court of Appeals for the District of Columbia Circuit, on May 29, 1958, dismissed Petitioner's petition for review as presenting no justiciable controversy, and pointed out that the Commission's subsequent interpretation of its order "may be changed or it may never be enforced."[7] That Court did not, as requested by the Commission, affirm the Commission's order. The Commission thereafter continued to insist upon its

[7] *Vulcanized Rubber & Plastics Company* v. *Federal Trade Commission*, 258 F. 2d 684, 685 (D.C. Cir. 1958); (App., p. 13a).

disapproval of Petitioner's designation of its combs as "rubber-resin" and Petitioner continued to assert that such designation was not prohibited by the Commission's order.

The Commission issued no complaint against Petitioner's designation of its combs as "rubber-resin" and gave no opportunity for hearing before a hearing examiner on the lawfulness under Section 5(b) of the Federal Trade Commission Act of Petitioner's designation of its combs as "rubber-resin." Instead, the Commission brought a penalty suit against Petitioner under Section 5(l) of the Federal Trade Commission Act in a district court of the Third Circuit. This suit was instituted on April 7, 1959, approximately 11 months after the United States Court of Appeals for the District of Columbia Circuit had held that the Commission's subsequent interpretation of its order against Petitioner presented no justiciable controversy. The district court granted summary judgment for the Commission and imposed penalties upon Petitioner in the amount of $6,000 (R., Appellant's App., p. 78a).

Petitioner filed in the Court of Appeals below an appeal from the judgment of the district court. On March 8, 1961, a majority of the Court of Appeals below entered a judgment affirming the judgment of the district court (App., p. 11a). It is the affirmance by the Court of Appeals below of the judgment of the district court that is the basis for this Petition for a *writ of certiorari*.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals below should be reviewed because:

(1) The decision of the Court of Appeals below is in conflict with a final ruling of the United States Court of Appeals for the District of Columbia Circuit on the same matter, which ruled that a cease and desist order of the Federal Trade Commission prohibiting Petitioner from

designating combs manufactured by it as "rubber" or "hard rubber" does not prohibit Petitioner from designating such combs as "rubber-resin."

(2) The Court of Appeals below has sanctioned an unlawful departure by the district court from the plain requirements of the Federal Trade Commission Act, in that the Court of Appeals below has affirmed the imposition by the district court of civil penalties upon Petitioner under Section 5(l) of the Federal Trade Commission Act for the designation of combs manufactured by it as "rubber-resin" (a) without the issuance of a complaint by the Commission charging that such designation is in violation of Section 5(b) of said Act, (b) without affording Petitioner an opportunity for hearing on such complaint and (c) without the issuance of a cease and desist order prohibiting Petitioner from designating combs manufactured by it as "rubber-resin," all as required by Section 5(b) of said Act, and (d) without affording a respondent an opportunity for direct appeal from said order to an appropriate United States Court of Appeals as required by Section 5(c) of said Act.

The United States Court of Appeals for the District of Columbia Circuit correctly ruled that the Commission's cease and desist order does not prohibit Petitioner from designating its combs as "rubber-resin." The Commission's order was by its terms carefully and explicitly limited to prohibiting Petitioner from designating its combs as "rubber" or "hard rubber" unless such combs in fact are made by the process of vulcanization with sulphur. Throughout the extended hearing on the Commission's complaint before a hearing examiner of the Commission, Petitioner at all times freely conceded that its combs then designated as "rubber" or "hard rubber" were in fact not made by the process of vulcanization with sulphur.

After the Commission issued its order and while Petitioner's petition for review was pending in the United

States Court of Appeals for the District of Columbia Circuit, on direct appeal from the Commission's order, Petitioner informed the Commission that it intended to comply with the order by designating its combs as "rubber resin," in place of the prohibited designations "rubber" or "hard rubber."

The Commission, notwithstanding that its order was carefully and explicitly limited to prohibiting Petitioner from designating its combs as "rubber" or "hard rubber," informed Petitioner that it considered the designation "rubber-resin" as also prohibited by the order. (R., Appellant's App., p. 62a). Thereupon, petitioner, with leave of court, amended its petition for review in the United States Court of Appeals for the District of Columbia Circuit and asserted that the designation of its combs as "rubber-resin" was not prohibited by the Commission's order. That Court, after full argument, agreed with Petitioner that the Commission's subsequent interpretation of its order as prohibiting Petitioner from designating its combs as "rubber-resin" found no support in the order "*as written*" (App., p. 13a). Accordingly, that Court dismissed Petitioner's direct appeal on the ground "that there is no controversy calling for judicial review of the [Commission's] interpretation at the present time" (App., p. 13a).

The United States Court of Appeals for the District of Columbia Circuit pointed out that the Commission's "interpretation may be changed or it may never be enforced" (App., p. 13a). Clearly, if that Court had concluded that petitioner's designation of its combs as "rubber-resin" was a violation of the Commission's order as a matter of law, which was the conclusion the Commission unsuccessfully asked that Court to come to, that Court would have issued an order of affirmance of the Commission's order. Instead, it rejected the Commission's contention and dis-

missed Petitioner's appeal for lack of a justiciable controversy.[5]

As the Honorable Judge Hastie points out in his dissenting opinion in the Court of Appeals below, "Analytically, this unusual ruling [of the United States Court of Appeals for the District of Columbia Circuit] must have been based upon an intermediate conclusion that the order 'as written' did not make illegal the use of the designation 'rubber-resin' for the defendant's combs" since "obviously, if it did, the petition [for review] challenged the order 'as written'" (App., p. 9a).

It is no inadvertance on the part of the Commission that its order was limited to prohibiting Petitioner from designating its combs only as "rubber" or "hard rubber". As Judge Hastie points out in his dissenting opinion in the Court of Appeals below, the Commission's administrative proceeding against Petitioner's labeling of its combs "was solely concerned with and directed at the use of the designations of 'rubber' and 'hard rubber'" (App., p. 8a).

The hearing examiner stated in his initial decision that "this case has been entirely tried . . . upon the issues thereof which present the more limited question of whether respondent's combs . . . can properly be labeled and advertised as 'rubber' or 'hard rubber' combs" (R., Appellant's App., p. 10a). The hearing examiner stated, further, in his initial decision that "The gist of this proceeding is whether or not the representations of respondent in its advertising and labeling or branding of combs that are made of Kralastic D as 'Hard Ruber' or 'Rubber' are false, misleading and deceptive" (R. Appellant's App., p. 14a).

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[5] The Commission did not seek review in this Court of the refusal of the United States Court of Appeals for the District of Columbia Circuit to affirm its order.

The essence of the findings of the hearing examiner was "that the word 'rubber' when stamped or branded on a comb indicates that the same is a 'hard rubber' comb" and that the term "hard rubber" is properly used on a comb only when it is made by the process of vulcanization with sulphur (R. Appellant's App., pp. 17a-18a). Significantly, as Judge Hastie points out in his dissenting opinion in the Court of Appeals below, the designation "rubber-resin" is used *facio* by the hearing examiner in his initial decision, which was adopted by the Commission, to describe the material of which Petitioner's combs are in fact made (App., p. 8a; R., Appellant's App., pp. 21a-47a).

Moreover, as to a comb made of a "rubber-resin compound," which Petitioner's combs are in fact made of, the hearing examiner pointedly stated as to such a comb that "This is a far cry from any claim that it is 'hard rubber' or will produce a 'hard rubber' product . . ." (R., Appellant's App., p. 47a).

The majority opinion of the Court of Appeals below completely misconceives the nature of the Commission's complaint and the administrative proceeding thereon against Petitioner. It concludes that "The substitution of the compound word 'rubber-resin' for 'rubber' on a product which is not produced with the ingredients and *by the process held by the Commission to be the only recognized method to produce 'rubber'* is as much a violation of the Order as if defendant had continued to label its combs 'rubber'" (Emphasis supplied) (App., p. 7a).

The Commission did not in any respect hold or purport to hold that "the only recognized method to produce 'rubber'" is by the process of vulcanization with sulphur. As Judge Hastie succinctly puts it in his dissenting opinion in the Court of Appeals below, "The government's evidence indicated that the names 'rubber' and 'hard rubber' meant

and connoted [to purchasers of combs] vulcanized hard rubber and nothing else"[9] (App., p. 8a).

Petitioner is in agreement with the majority of the Court of Appeals below on one point, namely, that "The precise issue to be determined in this appeal [and also on this Petition] is whether the defendant [here Petitioner] by labeling its combs rubber-resin violated the Commission's cease and desist Order. *Federal Trade Commission* v. *Morton Salt Company*, 334 U.S. 37, 54 (1948)." (App., p. 4a). Petitioner is also in agreement with the majority of the Court of Appeals below that in framing a cease and desist order the Commission "cannot be *required* to confine its road block to the narrow lane the transgressor has traveled. . . ." (Emphasis supplied). *Federal Trade Commission* v. *Ruberoid Company*, 343 U.S. 470, 473 (1952).

The *Ruberoid* case, however, is no authority for "The precise issue" here. In that case, petitioner was attacking the *breadth* of the Commission's order, which was asserted to have gone too far. Here, though, Petitioner is attacking the Commission's order on the ground that it does not *include* a prohibition that the Commission by a subsequent interpretation seeks to read into the order. Petitioner does not contend that the Commission was *required* to confine its order solely to Petitioner's designation of its combs as "rubber" and "hard rubber"; but this is exactly what the Commission did. If the Commission had written its order originally, as it would now like to have it read, Petitioner would have had the opportunity for direct re-

[9] Judge Hastie also pointed out in this connection that "In the light of the matter actually litigated and the recognition by the hearing examiner that defendant's combs were in fact 'rubber-resin,' it is significant that in the Commission's order the words 'rubber' and 'hard rubber' are placed within quotation marks" and that "This is an additional indication that the proceeding was solely concerned with and directed at the use of the designations 'rubber' and 'hard rubber'" (App., p. 8a).

view on the merits of the order in the United States Court of Appeals for the District of Columbia Circuit. *Vulcanized Rubber & Plastics Company* v. *Federal Trade Commission*, 258 F. 2d 684 (D.C. Cir. 1958); (App., pp. 12a-13a).

Neither *United States* v. *Piuma*, 40 F. Supp. 119 (S.D. Cal. 1941), aff'd *sub nom. Piuma* v. *United States*, 126 F. 2d 601 (9 Cir. 1942) nor *In re Whitney & Company*, 273 F. 2d 211 (9 Cir. 1959) are apposite to "The precise issue" here. The *Piuma* case involved an order of the Commission that clearly by its terms prohibited *any* claim that Glendage "constitutes a remedy for glands." The case of *In re Whitney & Company*, which was a criminal contempt proceeding for violation of an order of the Commission under Section 2(c) of the Clayton Act, 15 U.S.C. § 13(c), dealt with the payment of unlawful discounts, which was clearly prohibited by the terms of the Commission's order. Neither case involved, as here, the attempt of the Commission to prohibit the designation of a product by a specific name, which correctly describes the composition of the product, on the basis of a construction of its order not appearing within the terms of the order "as written."[10]

The Court of Appeals below has sanctioned an unlawful departure by the district court from the jurisdictional requirements of the Federal Trade Commission Act for the imposition of civil penalties under Section 5(l) of said Act. Since the United States Court of Appeals for the District of Columbia Circuit has ruled, and correctly Peti-

[10] The majority opinion of the Court of Appeals below makes reference to *Arrow Metal Products Corporation* v. *Federal Trade Commission*, 249 F. 2d 83 (3 Cir. 1957) and *Masland Duraleather Co.* v. *Federal Trade Commission*, 34 F. 2d 733 (3 Cir. 1929). These cases are equally inapposite to "The precise issue" here. Both cases involve direct appeals from orders of the Commission that plainly embrace the designations in issue, "porcenamel" and "duraleather," respectively; and in both cases the Commission's order was found to have been based upon direct and adequate evidentiary findings in respect of the designations in issue.

tioner submits, that the Commission's cease and desist order here in issue does not by its terms prohibit Petitioner from designating its combs as "rubber-resin," it follows that the jurisdictional requisites for the imposition of civil penalties under Section 5(l) of the Federal Trade Commission Act are wholly lacking.

The Commission has sought the imposition of civil penalties against Petitioner for the designation of its combs as "rubber-resin" by circumvention[11] of the requirements of the Federal Trade Commission Act (a) for the issuance of a complaint charging a violation by Petitioner of Section 5(b) of this Act in respect of such designation of its combs, (b) for affording Petitioner an opportunity for hearing on such complaint, (c) for the issuance of a cease and desist order based upon a record of such hearing and (d) for an opportunity to Petitioner for direct judicial review of such an order.

The departure of the Commission in this case from its duties under the Federal Trade Commission Act substantially exceeds its departure from its duties under the Act in *Jacob Siegel Company* v. *Federal Trade Commission*, 327 U.S. 608 (1946). In the *Siegel* case, this Court struck down an order of the Commission prohibiting the designation of overcoats and topcoats as "Alpacuna," *not* on the ground that the Commission had failed to establish that the use of "Alpacuna" on such garments was deceptive but on the ground that the Commission had abused its discretion in concluding that only the excision of the name "Alpacuna" would avoid the deception. This Court held that failure of the Commission to consider whether any "qualifying language would eliminate the deception which it found lurking in the word Alpacuna" (at p. 613) was ground for reversal of the Commission's order.

[11] Significantly, Petitioner submits, the Commission did not seek the imposition of civil penalties against Petitioner in the district court of the District of Columbia Circuit but brought the penalty suit here in issue in a district court of another Circuit.

Unlike Petitioner's designation of its combs as "rubber-resin" in this case, the petitioner's designation of overcoats and topcoats as "Alpacuna" in the *Siegel* case was squarely before the Commission in an administrative proceeding which met all the requisites of Section 5 of the Federal Trade Commission Act; and the petitioner in the *Siegel* case was afforded opportunity for direct judicial review of the Commission's order in respect of "Alpacuna."

The decision of the majority of the Court of Appeals below would sanction the Commission's arbitrary and capricious procedure in attempting to circumvent the basic requirements of Section 5 of the Federal Trade Commission Act to prohibit Petitioner from designating combs manufactured by it as "rubber-resin," when such is the fact.

The completely indefensible and unwarranted position in which the Commission has placed Petitioner is forthrightly stated by Judge Hastie in his dissenting opinion in the Court of Appeals below, as follows:

> "Thus, the defendant is now in this position. It is held to have violated an order by using a label 'rubber-resin'—which under the ruling of the District of Columbia court was not forbidden by the order as written. Moreover, the defendant, which never had an opportunity before the Commission or on direct appeal from its order to have a hearing on the question whether the description 'rubber-resin' suggests some vulcanized hard rubber content or is otherwise deceptive, cannot have that issue litigated now because this is a collateral proceeding in which merely the meaning of the order, rather than its justification on the administrative record, can be litigated.
>
> "Administrative and judicial processes should not combine to impose such a dilemma upon a party. I see no way to solve this problem fairly except to hold that the ruling of the court below was inconsistent with the decision of the Court of Appeals for the District of

Columbia and, therefore, precluded by it. This would make it necessary for the Commission to challenge the defendant's use of 'rubber-resin' as deceptive in a new administrative proceeding, thus affording the defendant for the first time an opportunity to contest that issue." (App., pp. 9a-10a)

CONCLUSION

For the foregoing reasons, this Petition for a *writ of certiorari* should be granted.

Respectfully submitted,

Donald E. Van Koughnet
David H. H. Felix
William F. Heefner
Attorneys for Petitioner